STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2003
v	No. 229187 Genesee Circuit Court
MARK DAVID LONDY, Defendant-Appellant.	LC Nos. 99-005229-FC; 99-005230-FC; 99-005231-FC

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), involving his two stepdaughters. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of twenty to forty years for each conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by denying his motion for a new trial on the basis that the jury's verdict was against the great weight of the evidence. We review the trial court's decision for an abuse of discretion. *People v Elkhoja*, 251 Mich App 417, 446; 651 NW2d 408 (2002). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*., quoting *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

Relying on *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), defendant argues that the trial court should have granted him a new trial after finding the testimony of the prosecution witnesses not credible, thereby acting as a "thirteenth juror." Defendant's reliance on *Herbert* is misplaced. In *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998), our Supreme Court overruled *Herbert* to the extent it permitted a trial court to grant a new trial based on its disagreement with the jurors assessment of credibility. The Court in *Lemmon* explained that "[a] trial judge does not sit as the thirteenth juror [when] ruling on [a] motion[] for a new trial"; rather, it "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. Only exceptional circumstances permit the trial court to substitute its view of credibility for that of the jury. *Id*. at 642.

In this case, the jury was able to hear and observe both the victims and defendant and assess who was telling the truth. In *Lemmon*, the Court recognized the unique opportunity for

the jury to assess witness credibility in this regard. *Id*. at 646. Although defendant denied any wrongdoing, both victims testified that he sexually assaulted them and their testimony regarding various matters was corroborated by other testimony at trial. There were no exceptional circumstances here that would allow the trial court to substitute its view of witness credibility for that of the jury. Accordingly, the trial court did not abuse its discretion in denying defendant's motion.

Defendant next argues that reversal is required because of a variance in the information and the victims' testimony at trial regarding the dates of the alleged offenses. We disagree. A variance as to the time of the offense is not fatal "unless time is of the essence of the offense." MCL 767.45(1)(b). Time is generally not of the essence, nor a material element, in a criminal sexual conduct case, particularly when the victim is a child. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). Because time is not of the essence, any variance between the information and trial proofs is harmless. *Id*. at 635. Here, considering that the evidence showed that the sexual abuse occurred repeatedly, that the child victims resided in the same household with defendant during the pertinent time period, and that defendant's defense consisted of a general denial of any sexual abuse, defendant has not shown that any variance was fatal or prejudicial.

In a related argument, defendant argues that he was deprived of due process because the informations were overly broad and failed to specify an exact date that the charged crimes occurred. We disagree. We review for an abuse of discretion a trial court's determination as to when and to what extent specificity of the time frame of the charged crime will be required within an information. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

The Legislature has provided that an information need only state the time of an offense "as near as may be." MCL 767.45(1)(b). However, the trial court "may on motion require the prosecution to state the time or identify the occasion [of the offense] as nearly as the circumstances will permit, to enable the accused to meet the charge." MCL 767.51.

In *Naugle, supra* at 233-234, this Court identified several factors that should be considered in determining to what extent specificity of the time of the offense will be required. These include: "(1) the nature of the crime charged; (2) the [complainant's] ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *Id.*

Here, the charges involved sexual assaults of young children who reasonably might fail to recall specific dates of ongoing assaults. *Id*. at 234 n 1. Second, the victims actually could not recall the specific dates during which the assaults occurred. Third, the prosecutor attempted to pinpoint specific dates. Lastly, defendant suffered no prejudice in preparing his defense because time was neither of the essence nor a material element of the CSC charges against him. *People v Miller*, 165 Mich App 32, 46-47; 418 NW2d 668 (1987); *Stricklin, supra* at 634. There is nothing suggesting that defendant could have presented a different defense at trial if the charges had been more specific concerning the dates of the offenses. Because the alleged sexual abuse occurred repeatedly throughout the time period charged in the information, it is not likely that defendant could have presented a more viable defense than that which he presented at trial. See, e.g., *Naugle, supra* at 234-235. Although defendant asserts that the lack of specificity prevented him from developing an alibi defense, it is not reasonably likely that he could have raised an

effective alibi defense because the alleged abuse occurred repeatedly throughout the pertinent time frame during which defendant and the child victims resided together. *Naugle, supra* at 234-235. Thus, this issue does not warrant reversal.

Next, defendant argues that the trial court erred in admitting rebuttal evidence. We disagree. We review the trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "Rebuttal evidence is admissible to 'contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id*. at 399, quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947). The test is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Id*.

In this case, the prosecutor's theory was that the child victims were compliant with defendant's sexual assaults and didn't disclose the assaults because they were afraid of defendant. In response to this issue, defendant presented evidence that he never disciplined the children, as well as evidence that it was the children's mother, not himself, who had a tendency toward violent behavior in the household. Once defendant presented this evidence, he opened the door to evidence bearing on whether he displayed violence toward the children. The rebuttal testimony was properly responsive to the evidence presented and impressions created by defendant in his case-in-chief.

Defendant correctly asserts that it is an improper tactic to elicit a denial on cross-examination in order to inject a new issue into the case. *Figgures*, *supra* at 401. Here, however, the prosecutor did not, by virtue of his cross-examination, inject a new issue into the case. The prosecution asserted in its case in chief that fear of violence discouraged the victims from disclosing the sexual abuse, and defendant's presentation of evidence that he did not discipline or act violently toward the children made the cross examination entirely appropriate.

Defendant also argues that the rebuttal testimony violated the rule that extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981). A matter is collateral if it is "neither 'relevant to the substantive issues in the case' nor 'independently provable by extrinsic evidence, apart from the contradiction, to impeach, or disqualify the witness.'" *Id*, quoting McCormick on Evidence (2d ed), § 47, p 99; § 36, pp 70-71. In this case, whether defendant acted violently toward the victims' brother was not a collateral matter. It was relevant to the prosecutor's theory that defendant acted with violence against the children, which led the victims to submit to defendant's sexual assaults and not disclose the assaults. Defendant has not shown that the trial court abused its discretion in allowing the challenged testimony.

Next, defendant argues that the evidence was insufficient to support his conviction for first-degree CSC in docket number 99-005231 because there was insufficient evidence of penetration. We disagree. To determine whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is

not required." MCL 750.520a(l). Thus, an "act of cunnilingus, by definition, involves an act of sexual penetration." *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). "'[C]unnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic].'" *Id*. at 133, quoting *People v Harris*, 158 Mich App 463, 470; 404 NW2d 779 (1987). In this case, the victim testified that defendant took his tongue, put it on her vagina, and licked around it. Viewed most favorably to the prosecution, the victim's testimony was sufficient to establish that cunnilingus occurred. Accordingly, there was sufficient evidence of penetration to support defendant's conviction of first-degree CSC.

Next, defendant argues that reversal is required because of the admission of other acts evidence. We disagree. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when the trial court has clearly abused its discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "An abuse of discretion [exists] only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

MRE 404(b) governs the admission of evidence of other acts. It provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*

Here, the court did not abuse its discretion in admitting evidence of other uncharged sexual assaults against the victims. This evidence was properly admitted under *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), and was also admissible to rebut defendant's claim that the charges were fabricated. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999), affirmed 464 Mich 756 (2001). Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, MRE 403, especially considering that the court gave a limiting instruction. *Id*. at 586.

Defendant also contends that the evidence concerning his assault on the victim's brother at a wedding reception was improperly admitted under MRE 404(b). The prosecutor offered this evidence to show that defendant used the threat of violence against the girls to induce their submission and dissuade them from reporting the sexual assaults. Thus, the evidence was offered for a proper purpose, i.e., one other than to show defendant's propensity to commit the

offenses. The evidence was also relevant under MRE 401. See *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Evidence that defendant displayed violence toward the victims' brother tended to make it more probable than not that he used the threat of violence toward the victims, and also rebutted defendant's assertions that he did not discipline the children or act violently toward them. Moreover, the evidence was sufficiently probative to prevail under the balancing test of MRE 403. The court did not abuse its discretion in allowing the challenged evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette